ex parte orders were made and in the light of the events that may have transpired thereafter, we thought it preferable that this matter should be remitted to the learned Judge to settle the terms and form of the appropriate order, and we so ordered. The deposits lodged in court by way of security are to be paid out to the appellants to account of their costs.

Appeals allowed.

Solicitors: *Shearn Delamore & Co.; Azman, Davidson & Co.*

LIM YEE CHEONG v. HAJI MOKTY BIN DATUK MAHMOOD & ORS.

[F.C. (Abdul Hamid C.J. (Malaya), Hashim A. Yeop Sani & Abdoolcader F.JJ.) July 24 & August 24, 1984]

[Ipoh – Federal Court Civil Appeal No. 27 of 1983]

Societies – Staff Provident Fund – Winding up – Reserve Fund – How distributed.

Staff Provident Fund – Winding up – Reserve Fund Distribution of.

In this case the Malaysian Mining Staff Provident Fund was established to provide for the retirement benefits of Malaysian employees of various companies involved in the mining industry. It was the practice of the trustees of the fund to pay the capital gain obtained from the realization of equity investments to a Reserve Fund. The Provident Fund was wound up and the questions posed to the court were –

(1) whether the trustees were correct in crediting the investment surplus to the Reserve Account under the Rules;
(2) what is the distribution scheme allowed by law for the surplus funds and assets of the Fund.

The learned trial judge held that the sum in the hands of trustees came within the definition of reserve account and that the persons entitled to the money were those who were contributors on the date of winding up, that is 31st July, 1981. He also held that it would be fair and equitable that the distribution be made pro-rata in accordance with the amount of the respective contributions standing to the credit of the Fund. The appellant who represented the class who advocated for an equal rather than a proportionate distribution appealed.

Held: (1) it was not improper in this case for the trustees to have credited the surplus investments into the Reserve Account;

(2) *prima facie* the distribution of surplus funds of a society which has ceased to function should be based solely on contract and not on equity and therefore the funds are distributable among the members or contributors at the relevant date per capita or equally. However the rules governing the Fund may have written into them the basis of inequality among the different classes of members in relation to the principal contractual burdens and benefits of membership. Such expressed provisions in the Rules will alter the presumption in favour of inequality of distribution;

(3) in this case the surplus fund should be distributed to those members who were contributors on the date of the winding up of the Fund in proportion to the amount standing to the credit of each contributor in the books of the Fund at that date.

Cases referred to:

(1) *In re Customs & Excise Officers' Mutual Guarantee Fund* [1917] 2 Ch. 18.
(2) *Tierney* v. *Tough* [1914] 1 I.R. 142.
(3) *In re Bucks Constabulary Widows' Fund (No. 2)* [1979] 1 W.L.R. 936, 942.
(4) *In re Sick and Funeral Society* [1973] Ch. 51.
(5) *Cunnack* v. *Edwards* [1896] 2 Ch. 679.
(6) *In re William Denby & Sons Ltd. Sick and Benevolent Fund* [1971] 1 W.L.R. 973, 978.

FEDERAL COURT.

V. P. Pradhan for the appellant.
W. S. W. Davidson for the 1st and 2nd respondent.
P. P. R. Royan for the 3rd respondent.
Manjit Singh for the 4th respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the Judgment of the Court): The Malaysian Mining Staff Provident Fund (hereinafter referred to as the "Fund") was a fund established to provide for the retirement benefits of Malaysian employees of various companies involved in the mining industry. At all relevant times the Fund was an approved fund under section 16(1) of the Employees Provident Fund Ordinance 1951. However by an amending act in 1975 effective from March, 1975 the Fund became an "approved fund" only in respect of those employee contributors who were contributing prior to March 1, 1975. Since no employee contributors could have been admitted since March 1, 1975 the Fund thereafter became a dying fund. The trustees held a meeting on October 1, 1980 and recommended that the Fund be wound up and a unanimous resolution to this effect was passed at a meeting of member companies held on July 15, 1981. The effective date of the winding up was fixed as at July 31, 1981 (the "relevant date") and since then no further contributions have been received.

According to the affidavit of the accountant involved in the administration of the Fund (pages 11 to 18 in Appeal Record) it was the practice of the Trustees of the Fund to invest in trustee approved equity investments. When the investments were realised it was always the practice of the trustees not to treat any capital gain as income but to transfer the amount when received to the Reserve Account established under Rule 24(c) of the Rules. The trustees did this for the purpose of providing a hedge against future losses and other contingencies. Although prior to 1980 i.e. in the years ending 1978 and 1979 these amounts were insignificant, the realisation of investments accelerated from after the end of 1980 to the end of 1981 resulting in capital gain of $2,325,217/- for the year ending December 31, 1980 and a further capital gain of $8,236,686/- for the period ending July 31, 1981. These amounts were categorised as "investment surplus" and credited to the Reserve Account as aforesaid. The amount in the Reserve Account now stands at $11,295,133/-.

By Originating Summons dated February 12, 1982 the trustees of the Fund sought for certain directions from the High Court, Ipoh on the true and proper construction of certain Rules in the Malaysian Mining Staff Provident Fund Rules. The questions posed to the court spanned over five pages of the Originating Summons (pages 5 to 9 of Appeal Record) but the questions actually relate to two basic issues, namely –

(1) whether the trustees were correct in crediting the investment surplus to the Reserve Account under Rule 24(c) of the Rules; and

(2) if the answer to question (1) is in the affirmative, what are the limitations on the discretion of the trustees in the matter of applying the undistributed reserve to the contributors of the Fund? The second issue may be stated in a simpler way i.e. what is the distribution scheme allowed by law for the surplus funds and assets of the Fund.

In the Originating Summons the first three defendants were brought in with their consent to represent specified categories of contributors. The first defendant represents the category of substantial contributors to the Fund who were still members as at July 31, 1981. This class of members argued that the trustees' powers are limited to distributing to the remaining members as at July 31, 1981 on a basis proportionate to the amount standing to the credit of the individual members. The second defendant represents the small contributors who were still members as at July 31, 1981 who would be interested in a distribution on an equal rather than proportionate basis. The third defendant represents the former contributors who would argue for a resulting trust and that the discretion of the trustees is wide enough to include payment to former contributors in their distribution. The fourth defendant (the Employees Provident Fund Board) was interested only to the extent that on the winding up of the Fund the surplus funds should be paid to the Employees Provident Fund under the provisions of the Act and rules and the mode of distribution would be left to the trustees of the Fund as the court may direct. The fifth defendant (the Attorney-General) informed the court at the outset that the Federal Government was not claiming the surplus funds as *bona vacantia.*

At the conclusion of the hearing in the court below, the learned Judge decided on the issues as follows:–

"(1)The sum of $10,930,759 now in the hands of the plaintiffs as trustees comes within the definition of reserve account under rule 24(c) of the Fund Rules.

(2) The persons entitled to the money are those who were contributors as at 31.7.81. Distribution to these contributors to be pro rata in accordance with the amount of their contributions standing to their credit in the Fund."

The learned Judge held that in the circumstances of the case the money in the hands of trustees now standing in the Reserve Account represents Investment surplus which is available for distribution upon winding up of the Fund. He was also of the view that "it would be fair and equitable" that only the contributors as at July 31, 1981 be paid and that the distribution be made pro rata in accordance with the amount of the respective contributions standing to the credit in the Fund.

The second defendant who represents the class that advocated for an equal rather than proportionate distribution scheme appealed. In effect his appeal was based on two main issues. First he contended that the surplus funds should not have been credited to the Reserve Account in the first place because the Reserve Account was only meant to provide for losses on realisation of investments and other contingencies. In other words that account is to act only as a hedge whereas in this case no loss has been made out.

The contention that the investment surplus has not been properly credited to the Reserve Account was also shared by the first defendant, now the third respondent.

The second issue raised in the appeal is the question on the mode of the distribution of the surplus funds to the employee members of the Fund. The appellant's argument is basically that whereas the older cases dealing with distribution of funds of this nature were decided on the principle of resulting trust the modern attitude of the courts in such cases now apparently is to base distribution on contract. The presumption is that where the rules are silent, the surplus funds should be distributed equally between the employee members of the Fund. Only an expressed provision of the rules can displace this presumption.

The fourth respondent gave notice of cross-appeal. The fourth respondent was third defendant in the original suit who represented former contributors of the Fund who ceased to be members prior to July 31, 1981. The fourth respondent supports the judgment of the learned Judge that the surplus funds was properly credited into the Reserve Account. He apparently based his argument on the purported reasoning that the Reserve Account provision (Rule 24(c)) was the only provision available for such funds in the rules. The second issue raised by the fourth respondent was what meaning should be given to the words "employee members". It was the contention of the fourth respondent that on a proper construction of Rule 24(c) of the Rules and considering the objects of the Fund, there is absolute discretion on the part of the trustees of the Fund to order for a distribution scheme embracing all the following classes of persons in equal shares, namely:–

(a) the persons who were contributors (as defined in the said Rules) as at July 31, 1981;

(b) the estates and dependants of persons who were contributors as at 31st July 1981 but who had since died;

(c) the persons who were formally contributors but who had ceased to be so, prior to July 31, 1981 and are still living; and

(d) the estates and dependants of the persons who were formerly contributors but who died prior to July 31, 1981.

We will now deal with the issue whether the trustees of the Fund were correct in law to have credited the surplus funds arising from the sale of investments to the Reserve Account under Rule 24(c) of the Rules of the Fund. Since the whole of Rule 24 deals with matters of accounting, it is convenient that the whole provisions under Rule 24 be reproduced and they are as follows:–

"24(a) All income arising from the investments and any other assets of the Fund as and when received shall be placed to the credit of Income and Expenditure Account in the books of the Fund and out of the Fund the Trustees shall pay the remuneration of the Secretaries and Treasurers, the Auditors' fee and the fees payable to any bank or trust company and other expenses of or incidental to the Fund, including all the expenses of the Trustees incurred in the performance of their duties as such but not including any remuneration to the Trustees for their services which shall be given without remuneration. Such remuneration fees and expenses shall be debited to Income and Expenditure Account. On or as soon as may be after 31st December each year the balance standing to the Credit of the Income and Expenditure Account on that date (subject to any amount allocated to or from the Reserve Account as hereinafter mentioned) shall be divided among the Contributors' Account in proportion to the amount standing to the credit of each contributor in the books of the Fund on the said date but shall not in any case be less than 2½% per annum one half thereof being credited to the contributors' contributions and the other half being credited to the Companies' contributions.

(b) Before the balance standing to the credit of the Income Account is divided among the accounts of contributors as provided for under Rule 24(a) the Trustees shall have power to allocate to or from a Reserve Account provided for under Rule 24(c) such amount as they may think necessary to provide for variation in the values (whether realised or otherwise) of the securities of the Fund or other contingencies and to carry forward such amount as they may deem advisable. For the purpose of this Rule the Trustees shall cause all investments of the Fund to be revalued at 31st December in each year.

(c) A *reserve account* shall be credited in order to provide against a loss on realisation of investments or other contingencies and may also be used, *at the absolute discretion of the Trustees,* for the benefit of employees members or other dependants or for any other purposes whatsoever. Any sum which may under these Rules become forfeit to the Fund, together with the amount allocated under Rule 24(b) shall be carried to this Reserve Account.

(d) In the event that the funds in the Reserve Account shall be insufficient to provide against any loss on realisation of investments, *the Trustees may in their absolute discretion* call for voluntary contributions from the Companies which contributions shall then be credited to the Reserve Account provided always that the said contributions and the current monthly contributions shall not at any event exceed 15% of the total salaries of the members employed by the Companies for the period in which the deficiency in the Reserve Account shall occur."

It was agreed that the word "credited" in

Rule 24(c) was a misprint of "created". It can be seen that the "Reserve Account" is referred to not only in Rule 24(c) but also in Rule 24(b). It would seem clear from the language of Rule 24(b) and Rule 24(c) the Reserve Account may be created at any time and monies may at any time before the balance in the income account is divided be transferred to or taken from it in the *absolute discretion* of the trustees.

Although all incomes from realisation of sales of investments should be credited into the account under Rule 24(a), there was nothing in our opinion to prevent the trustees from crediting the amount to the Reserve Account as a hedge against loss or other contingencies. It is an exercise of discretion of the trustees and also a matter of accounting for the purpose allowed by the Rules of the Fund. We do not therefore think that it was improper for the trustees to have credited the surplus investments into the Reserve Account.

The second issue is slightly more difficult. It concerns the question of distribution of the surplus funds after dissolution of the Fund. It would seem to us that the learned Judge must have grounded his distribution scheme on the principle enunciated by Astbury J. *In Re Customs & Excise Officer' Mutual Guarantee Fund*[1] where it was held that:–

"Where a fluctuating body of persons contribute to a fund vested in trustees, and intended to be permanent, for the purpose of performing a particular service for the contributors for the time being, and the need for that service comes to an end, the surplus of the contributed fund, after all the services provided by the trust have been performed, belongs to the class of contributors ascertained at the date when the purpose of the fund comes to an end in proportion to their contributions, and neither past contributors nor the Crown have any interest."

The distribution scheme would seem also to have followed that ordered in *Tierney* v. *Tough*[2] where O'Connor, M.R. said at page 157:–

"I am therefore of opinion that the fund is divisible amongst the members of the society who were in existence at the time when the business of the society ceased, and that the Fund is divisible among such members and the personal representatives respectively of such of them as have since died; and, following the mode of distribution in the *Printers' and Transferrers' Case*[1], I will declare that the fund is distributable in proportion to the amounts contributed by the members aforesaid."

Distribution of the surplus funds according to this principle is also advocated by the author of *Baden Fuller* on Friendly Societies, 4th ed. (1926) at page 186 quoted by Walton J. in *In re Bucks Constabulary Widows' Fund (No. 2)*[3] at page 942 as follows:–

"If the rules provide for the termination of the society they usually also provide for the distribution of the funds in that event, but if on the termination of a society no provision has been made by the rules for the distribution of its funds, such funds are divisible among the existing members at the time of the termination or dissolution in proportion to the amount contributed by each member for entrance fees and subscriptions, but irrespective of fines or payments made to members in accordance with the rules."

In *In re Sick and Funeral Society*[4] Megarry J. dealt with a society formed at a Sunday school to provide for sickness and death benefits for its members. The society was formed in 1866. In 1968 the trustees presented a petition to wind up the society and winding up order was made on November 18, 1968. On a summons by the liquidator to determine among what members or former members or their estates and in what proportions the surplus assets were distributable, Megarry J. analysed the relevant authorities on the question of basis of distribution at page 58:–

"The authorities are in a curious state. In *In re Printers and Transferrers Amalgamated Trades Protection Society* [1899] 2 Ch. 184, Byrne J. applied the amounts-contributed basis to a trade union, putting matters on the footing of a resulting trust, and directing division on that basis among the members existing at the time of the resolution for dissolution. In *In re Lead Company's Workmen's Fund Society* [1904] 2 Ch. 196, Warrington J. followed this decision in the case of an unregistered friendly society. In these cases payments for forfeitures, fines, sick benefits and so on, were disregarded. *In Tierney* v. *Tough* [1914] 1 I.R. 142, another case of an unregistered friendly society, O'Connor M.R. was critical of the application of the law relating to resulting trusts to such cases. Despite his criticism, however, he directed division on the basis of the amounts contributed. On the other hand, in the case of clubs, *Brown* v. *Dale* (1878) 9 Ch. D. 78 supports the per capita basis, though it is so shortly reported as to provoke more questions than it answers. *Feeney and Shannon v. MacManus* [1937] I.R. 23, another club case, also supports the same basis. The case is a little remarkable in that the headnote proclaims that *Tierney v. Tough* [1914] 1 I.R. 142 was 'applied', and it appears from page 33 that the basis of the decision was not so much that equal division was right, but that equality was necessary because ascertaining the proportionate contributions was an impossibility. Finally, in *In re St. Andrew's Allotment Association* [1969] 1 W.L.R. 229, concerning an allotment association, Ungoed-Thomas J. considered these cases, together with *In re Blue Albion Cattle Society* [1966] C.L.Y. 1274, *The Guardian*, May 28, 1966, where Cross J. had applied the per capita basis to a cattle-breeding society. In the *St. Andrew's case* Ungoed-Thomas J. said, at

pg. 238:

'If the true principle is that laid down in *Tierney* v. *Tough* (1914) 1 I.R. 142 and that principle certainly seems to me preferable to the principle of the resulting trust adopted in *In re Printers and Transferrers Amalgamated Trades Protection Society* [1899] 2 Ch. 184, then it would seem to me that prima facie the assets are distributable between members at the relevant date per capita. It is conceivable that a basis for distinguishing the friendly and mutual benefit society cases may be that, whereas in the club cases enjoyment ab initio and equality are contemplated, yet in the friendly and mutual benefit society cases what are contemplated are advantages related to contributions.' "

Membership of a club or association is primarily a matter of contract. Members make their payments and in return they become entitled to the benefits of membership in accordance with the Rules. There is no written law in this country governing the distribution of surplus funds of a society upon dissolution. The Rules of the society may provide for it. In the absence of such rules distribution must be on the basis of equality or division per capita. One must look at the rules of the society to see whether they indicate any basis other than that of equality. Thus as Megarry J. said where the rules have written into them the basis of inequality it follows that this inequality ought also to be applied to the surplus property of the society. *Cunnack* v. *Edwards*(5) was not cited to Megarry J. but referred to by Walton J. in *In re Bucks Constabulary Widows' Fund (No. 2). Cunnack* v. *Edwards* shows that the concept of resulting trust has been rejected by the courts in England for quite some time. Brightman J. made it clear in *In re William Denby & Sons Ltd. Sick and Benevolent Fund*(6):–

"One matter is common ground. It is accepted by all counsel that a fund of this sort is founded in contract and not in trust. That is to say, the right of a member of the fund to receive benefits is a contractual right and the member ceases to have any interest in the fund if and when he has received the totality of the benefits to which he was contractually entitled. In other words, there is no possible claim by any member, founded on a resulting trust."

In our opinion two principles therefore need to be observed. First, *prima facie* distribution of surplus funds of a society which has ceased to function as in this case should be based solely on contract and not on equity and therefore the funds are distributable amongst members or contributors at the relevant date per capita or equally. Secondly, Rules governing the Fund may have written into them "the basis of inequality among different classes of members in relation to the principal contractual burdens and benefits of membership". Such expressed provisions in the Rules will alter the presumption in favour of inequality of distribution.

According to Rule 17 of the Rules of the Fund the account of the contributor shall consist of the contributor's contributions (under Rule 14), the employer's contributions (under Rule 15) and any other income, interest or benefits derived from the income and payable to the contributor. Under Rule 24(a) relating to income and expenses of the Fund, all incomes arising from investments and any other assets of the Fund as and when received shall be placed on the credit of the income and expenditure account. On or as soon as after 31st December each year the balance standing to the credit of that account shall be divided among the contributors' account in proportion to the amount standing to the credit of each contributor in the books of the Fund on the said date.

A scheme for the distribution of surplus funds is already provided under Rule 24(a) of the Rules for the distribution of the surplus in the income and expenditure account. Since the surplus funds arising from the sale of investments can either be credited to the income and expenditure account under Rule 24(a) or if the trustees so decide, may also be credited under Rule 24(c) as a hedge against losses or any other contingencies at the absolute discretion of the trustees it is our opinion that the surplus funds should in this case be distributed to those members who were contributors on the relevant date in proportion to the amount standing to the credit of each contributor in the books of the Fund on that date.

As regards the cross-appeal there is no argument in our view that in law the members entitled to participate in the proceeds would *prima facie* be those who were members or contributors on the relevant date. This is what is meant by the author of *Baden Fuller* on Friendly Societies, 4th ed. (1926) when he said that "such funds are divisible among *the existing* members at the time of the termination or the dissolution" which is also consistent with the main authorities on the point.

The converse is reflected in the judgment of Walton J. in *In re Bucks Constabulary Widows' Fund (No. 2)* at page 943 where he observed that:-

"All unincorporated societies rest in contract to this extent, but there is an implied contract between all of the members inter se governed by the Rules of the Society.

In default of any rule to the contrary – and it will seldom, if ever, be that there is such a rule – when a member ceases to be a member of the association he ipso facto ceases to have any interest in its funds."

In *In re Sick and Funeral Society (supra)* the relevant date was December 31, 1966 when the Society ceased all its activities. Megarry J. held (at page 58) that:–

"In my judgment the substantive rights of all concerned crystallised on December 31, 1966 when in accordance with the resolution of December 12, 1966 the society ceased all its activities; . . . Accordingly, in my judgment, the personal representatives of each deceased member are entitled to the share to which that member would have been entitled had he lived."

Therefore in the present case the persons who would be entitled to the distribution would be –

(a) persons who were contributors (as defined in the Rules) as at July 31, 1981; and

(b) personal representatives or estates of persons who were contributors as at July 31, 1981 but who have since died.

The distribution shall be in proportion to the amount standing to the credit of each such contributor in the books of the Fund.

We would therefore dismiss the appeal and cross-appeal with costs but the order of the Judge shall be varied with regard to the proportion only to the extent as aforesaid. All costs shall be paid out of the Fund as agreed.

Appeal and cross-appeal dismissed.

Solicitors: *Skrine & Co.; Azman, Davidson & Co.; Shook Lin & Bok; Sri Ram, Zulkifly & Kumar.*

TIU SHI KIAN & ANOR. v. RED ROSE RESTAURANT SDN. BHD.

[O.C.J. (Wan Mohamed J.) July 19 & August 22, 1983]

[Kota Kinabalu – Civil Suit No. K419 of 1982]

Tort – Contempt of court in civil proceedings – Application to restrain defendants from disturbing plaintiffs' quiet use and enjoyment of premises – "Erinford Properties" type of injunction allowed by court – Closing of premises by defendants – Contempt of court

Company – Civil contempt of court – Associate company instrumental in breaching injunction – Lifting of corporate veil.

Practice and Procedure – Civil contempt of court – Plaintiffs instituting contempt proceedings – Court adding respondent of own motion – R.H.C. 1980, O.52 r.5.

The plaintiffs/applicants operated a nightclub and restaurant in licensed premises in Hotel Shangrila. The plaintiffs' application for an injunction dated November 24, 1982, to restrain the defendants from disturbing the plaintiffs' quiet use and enjoyment of the said premises and the equipment, furniture and fixtures therein and from removing the said equipment, furniture and fixtures, was dismissed on March 3, 1983. However, by a letter of the same date, the defendants had agreed to permit the plaintiffs continued operation of the premises. Contrary to the agreement, on March 6, 1983, the plaintiffs found the premises locked. Accordingly, on March 8, 1983, the plaintiffs applied for an "Erinford Properties" type of interim injunction on the same terms as their original application pending their appeal from the order dismissing the said application. The order was granted on March 14, 1983 and served on Albert Teo, the first respondent, on March 15, and on Datok Hong Sim Sui, the second respondent, on March 24 upon his return from Taiwan. Both Albert Teo and the third respondent, David U Kwok Fai, (whom the court cited as a respondent of its own motion) had knowledge of the order on the day of its making. On the nights of March 14 and 15, the plaintiffs were able to carry on their business at the premises but on the following night, March 16, the premises was again locked to them. Further, advertisements had appeared in the local newspapers of the same date advising the public of the closure of the said premises and the defendants' restaurant in the same hotel for renovation. The plaintiffs instituted proceedings against the 1st and 2nd respondents for civil contempt of court in breaching the order of March 14, 1983. The respondents contended that there could be no breach of an injunction which was impossible of observance as the said premises had been closed since the dismissal of the plaintiffs' application on March 3, 1983. Further, that the closure and the advertisements complained of were effected by a separate entity, Hotel Berjaya Sdn. Bhd., the owner of Hotel Shangrila. The defendant company and the respondents should not, therefore, be held responsible for such acts.

Held: (1) the following were the ingredients to found a case of civil contempt of court:

(i) the terms of the injunction must be clear and unambiguous;

(ii) the respondents must have proper notice of such terms;

(iii) there must be clear proof that the terms have been broken and breach must be proved beyond all reasonable doubts; and

(iv) proof of *mens rea* was not necessary;

(2) on the facts, all the necessary ingredients have been established. The plea that a separate entity, Hotel Berjaya Sdn. Bhd., was instrumental in breaching the order, would not exonerate the respondents as the defendant company and Hotel Berjaya Sdn. Bhd., though distinct entities, were